IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.66 OF 2005

IN

SUIT NO.447 OF 1965

Smt.Gopi widow of Tarachand R.Advani
Indian Inhabitant of Bombay,
residing at 14, Jasville, 4th Floor,
9, Marine Lines, Opp.Liberty Cinema, ...Plaintiff
Bombay - 400 001. (Applicant)

Versus

Shyamsunder Tarachand Advani,
Garden View, now known as
Shamkala Bunglow, Oomer Park,
95-1, Bhulabhai Desai Road,
Bombay - 400 026. ...Defendant

And

Shyamsunder Tarachand Advani,
Garden View, now known as
Shamkala Bunglow, Oomer Park,
95-1, Bhulabhai Desai Road, ...Plaintiff
Bombay - 400 026. to counter claim

Versus

Smt.Gopi widow of Tarachand R.Advani
Indian Inhabitant, of Bombay,
residing at 14, Jasville, 4th Floor,
9, Marine Lines, Opp.Liberty Cinema, ...Defendant
Bombay - 400 001. to counter claim

And

1.Indresh Shamsunder Advani,
residing at B/2, Shangrila
Apartments, St.Mary’s Colony,
Miramar, Panjim, Goa 403 001,

and also at C/o.Advani Car Rentals,
1st Floor, Nilkamal Arcade,
Above Neeta Sarees, Dr.A.B.Road,
Panaji - Goa.

2.The Registrar of Sub-Assurances,
Old Custom House,
Mumbai - 400 032. ...Respondents

.....

Mr.P.K.Samdani with Mr.Chetan Kapdia i/b Nankani & Associates for Applicant/Plaintiff.

Mr.Harish Jagtiani, Sr.Counel with Mr.Satish Shah i/b Hitesh C.Dabhi for Respondents.

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CORAM: A.M.KHANWILKAR, J.

JULY 13, 2005.

P.C.

1. This order will dispose of subject Chamber Summons, whereby, the Applicant/Plaintiff prays for the following relief:

> (a) That this Hon'ble Court be pleased to set aside the ex-parte order dated 30th April, 2002 and give consequential directions, including directing the Prothonotary & Senior Master, high Court, Bombay to take necessary steps for cancellation/forfeiture of stamp duty paid by Respondent No.1 and recall from Respondent No.2 the certified copy of

consent decree presented for registration by Respondent No.1;

(b) That pending the hearing and final disposal of the Chamber Summons this Hon'ble Court be pleased to restrain the Respondents from making any further steps in registering the Consent Decree dated 22nd February, 1977 presented by Respondent No.1 in July, 2003 for registration;

(c) For costs;

(d) Such other or further reliefs as the nature and circumstances of the case may require."

2. Briefly stated, the Defendant and one Tulsi/sister of Defendant and daughter of Plaintiff made declaration that money for acquiring the suit property absolutely belongs to the Plaintiff. That declaration was made on 13th August 1960. It is the case of the Plaintiff that the Plaintiff acquired the subject property i.e. Garden View at Omar Park under Deed of Conveyance dated 31st August 1960. As certain disputes developed between the Plaintiff and her son Shamsunder/Defendant, Plaintiff filed Suit in the year 1965 for appropriate reliefs in which, Consent Decree came to be passed on 22nd February 1977. It is the case

of the Plaintiff that immediately after two days, Plaintiff made a notarised declaration regarding the circumstances in which she has entered into Consent Terms with the Defendant and agreed for disposal of the Suit on those terms. Soon thereafter, in 1979, Plaintiff left for United States of America. It is the case of the Plaintiff that under the Consent Decree, the original Defendant was required to get the decree stamped and registered and also to get the property transferred in his name in the property card. None of these steps were taken by the original Defendant during his life time. It is the case of the Plaintiff that in fact, the original Defendant expressed repentance for having obtained Consent Decree from his mother, who was incidentally the Plaintiff and expressed that he will not act upon the said Consent Decree. It appears that the Office of the Prothonotary and Senior Master, on its own, drew up the said decree dated 22nd February 1977 and sealed the same on 24th March 1987.

3. The original Defendant died on 2nd June

2001, leaving behind four heirs namely, the Plaintiff being mother, Respondent No.1 (widow), Inder Shamsunder Advani (son) and one daughter. After the death of the original Defendant, the Respondent No.1, for the first time, on 20th January 2002, sought no objection certificate from the Plaintiff for repairs and renovations of the subject property. That request was not acceded to by the Plaintiff. It is seen that the Respondent No.1 then applied for Judge's Order on 30th April 2002. No notice was given either to the Plaintiff or any other heirs of deceased/original Defendant. The Judge's order was placed before Justice S.A.Bobde on 30th April 2002 when following order came to be passed :

> "UPON READING the Affidavit of Indresh S.Advani the Applicant herein solemnly affirmed on 23rd day of April, 2002 and UPON HEARING Ms.Alka Gandhi i/b Dave & Co., Advocates for the Applicant Legal heir of the Defendant abovenamed, who states that the Consent Decree dated 22.2.1977, sealed on 24.3.1987, operate as a transfer of immovable property mentioned in the Consent Decree and accordingly stamp duty has to be paid And that no stamp duty has been paid on Consent Decree and therefore allow the Applicant to pay the stamp duty.

> I Do Order that the Prothonotary & Senior Master, High court Bombay is directed to unseal the Consent Decree dated 22.2.1977 that the Prothonotary & Senior Master do hand over to the Applicant Advocate and acknowledge the Consent Decree for the purpose of payment of Stamp duty and send the Original Consent Decree to the office of Superintendent of Stamp for adjudication and ascertainment of Stamp duty. AND I DO FURTHER ORDER that the Applicant do pay the stamp duty under Section 2(g) of Bombay Stamps Act on the Consent Decree dated 22nd February 1977 AND I DO LASTLY ORDER that on the stamp duty being paid by the Applicant the Prothonotary & Senior Master do re-seal the said Decree and issue the Certified copy thereof to the Applicant."

4. It is the case of the Plaintiff that the Plaintiff became aware about the above said Judge's Order passed on 30th April 2002 for the first time in November 2004 when the Respondent No.1 disclosed that fact in the affidavit filed in some derivative proceedings between the parties. After the Plaintiff became aware about this development, the present Chamber Summons came to be filed on 18th January 2005 for the reliefs referred to earlier. In the meantime, however, on the basis of ex-parte Judge's Order, the Respondent no.1 proceeded to pay the stamp duty on the certified copy of the decree, on the basis of which the decree was purportedly

transferred in the name of the deceased. It is the case of the Plaintiff that inspite of the above, as the Respondent No.1 was unable to proceed with the repairs and renovations of the said property without the no objection of the Plaintiff, the Respondent No.1 propounded the alleged Will dated 12th May 2001 and applied for grant of Letters of Administration. In the said proceedings, ex-parte grant was obtained without service of citation on 10th January 2003. The Plaintiff has applied for revocation of the ex-parte grant and interim relief to injunct the Respondent No.1 from acting on the said grant. That will be, however, of no relevance to the subject matter involved in the present proceedings. In the present proceedings, this Court is concerned with the core issue as to whether the Plaintiff is entitled for the order of setting aside of ex-parte Judge’s order dated 30th April 2002 and for consequential directions on the assertions made in the affidavit-in-support of the present Chamber Summons.

5. According to the Plaintiff, the Judge’s Order could not have been passed without giving

prior notice to the concerned persons, particularly the Plaintiff. Reliance is placed on Rule 304 of the Bombay High Court (Original Side) Rules to contend that prior notice to the interested parties is imperative and in absence of such notice, ex-parte order passed, will have to be set-aside, relegating the Respondent No.1 to pursue the Judge's Order on its own merits in accordance with law. Relying on Rule 304, it is contended that the Judge's Order in question has been passed by the Court and not by the Prothonotary and Senior Master under the first part of the said Rule. It is then contended that the sole reason for seeking order in terms of Judge's Order dated 30th April 2002, pressed into service on behalf of Respondent No.2 was that the Office of the Prothonotary and Senior Master has sealed the said decree, without the same being sent to the Superintendent of Stamps for adjudication of stamp duty and which amounts to clerical error amenable to be rectified under Rule 304 of the Rules. It was, however, argued that such act of omission or commission cannot be corrected under Rule 304, as it is neither a clerical error nor in the realm of arithmetical

error or inaccuracy in the decree which alone can be corrected under Rule 304. It is then contended that it was not open to grant the Judge's Order on 30th April 2002, as the relief prayed therein was barred by law of limitation. For, Article 137 of the Limitation Act provides for maximum three years period to take out such application assuming the same was maintainable. Reliance was placed on the decision of the Supreme Court in the case of **Kerala State Electricity Board, Trivandrum vs. T.P.Kunhaliumma reported in (1976) 4 SCC 634**, in particular, Para 22, to contend that application of the kind filed by the Respondent, would be covered by Article 137 of the Limitation Act. It was argued that even if the date of sealing was to be taken as the commencement of limitation i.e. 24th March 1987, the Application filed by the Respondent No.1 on 30th April 2002 was clearly barred by limitation. It was next contended that the decree in question was passed as back as in 1977 which was a Consent Decree. To facilitate execution of such a decree, the Judgement Creditor and the Respondent No.1 who claims through the Judgment Creditor was required to take steps within twelve years

therefrom i.e. before 22nd February 1989 in terms of Article 136 of the Limitation Act and having failed to do so, the Application inviting Judge's Order moved on 30th April 2002 was barred by limitation. It was then contended that the decree as passed between the parties to the Suit was required to be registered by virtue of Section 17(1)(b) of the Registration Act, 1908 read with the provisions of the Transfer of Property Act, 1882. The period in which such a decree was required to be registered is provided in Section 23 of the Registration Act being four months from the date of execution of the document and in the case of decree, four months from the date of the decree. It is contended that at best, further four months period is provided for under Section 25 of the Registration Act and on failure to avail of that extended period, the decree has become inexecutable.

6. Relying on all these circumstances, it was contended that if prior notice was given to the Plaintiff before moving the Application inviting Judge's Order dated 30th April 2002, it would have

been possible for Plaintiff to agitate all possible contentions resisting the prayer of the Respondent No.1 as has been granted. It is contended that failure to give prior notice to the Plaintiff has resulted in manifest error which has caused serious miscarriage of justice to the Plaintiff and in the interest of justice, this Court will have to remedy the mistake and relegate the Respondent No.1 to pursue the remedy in accordance with law. It was also argued that the conduct of the Respondent No.1 has not been above board and has been considered by this Court in Chamber Summons No.1479 of 2002. This Court in its decision dated April 16, 2003 has deprecated the conduct of the Respondent No.1 and has found as of fact that he had persuaded the Court to pass orders by playing fraud.

7. On the above argument, it is prayed that this Court ought to set aside the ex-parte Judge’s Order dated 30th April 2002 and consequential relief of requiring the registered conveyance and decree to be brought to the Court and directing the Prothonotary and Senior Master to take necessary steps for cancellation/forefeiture of the stamp

duty paid by the Respondent No.1 and to recall from the Respondent No.2 the certified copy of the Consent Decree presented for registration of Respondent No.1.

8. On the other hand, Counsel for the Respondent No.1 would contend that the present Chamber Summons filed by the Plaintiff is ill-advised. According to him, the Judge’s Order passed on 30th April 2002, even if wrong, can be rectified and corrected only in an appeal to be filed against that order before the Appellate Court. In other words, it is contended that this Court being of co-ordinate jurisdiction, it is not open to set-aside the order which is passed on merits, considering all the relevant materials on record. It is then contended that on reading the Consent Decree as a whole, it is more than clear that the Plaintiff has conceded the position that the Defendant was in possession of the disputed property. Besides, it declares that the Defendant was the real and absolute owner in respect of the disputed property. Such decree was not required to be stamped and registered.

9. It is then contended that the Suit as filed by the Plaintiff is already worked out on passing of the decree dated 22nd February 1977. With the dismissal of the Suit, this Court has become *functus officio* and for which reason, it is not open to entertain the present Chamber Summons. It was contended that unless the Plaintiff was to challenge the decree, the Plaintiff had no locus to maintain any application such as the present one, as the Plaintiff was bound by the decree. Reliance was placed on the decision of the Apex Court reported in **AIR 1970 SC 1475 in the case of Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman & Ors.** to support this proposition. It was next contended that the Plaintiff is disentitled for any equitable relief from this Court on account of her conduct, especially for having taken inconsistent stand in the pleadings filed before this Court from time to time. It is next contended that the Plaintiff should be non-suited at the threshold, as the similar relief was claimed by the Plaintiff in the Notice of Motion taken out in Suit No.306 of 2004 between the parties. It was, therefore, not open

to the Plaintiff to take recourse to successive applications for the same relief in two proceedings which is against public policy. It is then contended that if the relief claimed in the present Chamber Summons was to be acceded, that would result in circumventing the mandate of Order XXIII Rule 3A of the Code of Civil Procedure. It is submitted that as the decree operates against the Plaintiff and so long as it is not challenged, the Application such as the one filed by the Plaintiff to undo the step taken in the aid of execution of a decree, cannot be countenanced.

10. It was also contended that the Chamber Summons should be thrown out on the ground of delay and latches, inasmuch as there is material to establish that the Plaintiff had knowledge about the Judge’s Order dated 30th April 2002 in July 2003 itself. Whereas, the present Chamber Summons has been filed in January 2005 on a wrong statement made in the affidavit-in-support that knowledge was acquired in November 2004.

11. It was argued the purport of the Consent

Decree between the parties to the Suit was one of a declaratory decree and also confirming the position that Plaintiff has handed over possession of the disputed property to the original Defendant. In such a case, contends Counsel for the Respondent, it was unnecessary to register the decree which operates as conveyance between the parties. Reliance was placed on the exception provided in clause (vi) of sub-section (2) of Section 17 of the Registration Act to buttress this submission. It was contended that decree on compromise was not required to be registered. However, the same has been made amenable to registration by virtue of the amendment to Bombay Stamps Act, 1958, which amendment was introduced with effect from 10th December 1985, enlarging the definition of conveyance under Section 2(g) of the said Act. Relying on the decision of the Apex Court in **AIR 1997 SC 2181 in the case of State of Himachal Pradesh vs. Keshav Ram & Ors.** (Para 3), it is contended that entry in the revenue papers by no stretch of imagination can form the basis for declaration of tile, which legal position is well established. It was submitted that the title of

the disputed property already vests with the original Defendant.

12. Reliance was also placed on the decision reported in **1977 (3) SCC 347 in the case of Girdhari Lal (Dead) By LRs. vs. Hukam Singh & Ors.**, particularly paragraph 10 thereof, wherein, it is observed that registration of compromise decree would be necessary unless terms of compromise involve execution of a Deed of Conveyance. It was argued that in the present case, the decree did not require execution of a Deed of Conveyance, for which reason, registration was not imperative.

13. Reliance was also placed on the decision reported in **AIR 2005 SC 439 in the case of Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors.**, in particular on Para 13, wherein it is observed that the constituted attorney cannot depose in place and stead of the Principal. This exposition is pressed into service as the Chamber Summons has been filed along with the affidavit in support thereof of the constituted attorney of the

Plaintiff. It was argued that even on fair reading of the said affidavit, it is not possible to discern as to which averments would support the Plaintiff's case; as to what facts have been made from the personal knowledge of the affiant and which facts have been asserted on the basis of instructions of the Plaintiff. On the above arguments, Counsel for the Respondent submits that the Chamber Summons taken out on behalf of the Plaintiff deserves to be rejected with costs.

14. On going through the pleadings and on the basis of rival submissions, following points would emerge for my consideration:

(1) Whether subject Chamber summons taken out by the Plaintiff is maintainable?

(2) Whether the Chamber Summons for setting aside Judge's Order dated 30th April 2002 is in time or barred by limitation?

(3) Whether the "ground" for Judge's Order

to unseal the decree is consistent with Rule 304?

(4) Whether prior notice to the interested parties before passing the Judge's Order was necessary?

(5) Whether the Plaintiff has disentitled herself from seeking any equitable relief from this Court?

15. Insofar as the question regarding maintainability of subject Chamber Summons is concerned, broadly it is contended on behalf of the Respondent that the said order can be corrected only by way of appeal and not by way of Chamber Summons. This submission does not commend to me. On the other hand, I find substance in the argument on behalf of the Plaintiff that on the principles underlying Order IX Rule 13, it is open for this Court to undo the mischief which has been caused on account of ex-parte order passed by this Court. Indeed, it is open to the Plaintiff to question the Judge's Order dated 30th April 2002 also by way of

appeal before the Appellate Court. However, that would not preclude the Plaintiff from taking recourse to remedy of Chamber Summons for setting aside an ex-parte order passed against her without giving notice. The fact that no notice was given to the Plaintiff or any other party before passing of the order dated 30th April 2002, is not in dispute. In cases where prior notice was required to be given before passing any order and if the same is not done, the order so passed will have to be recalled, if questioned by the opposite party. To recall such order, will be the bounden duty of the Court, applying the well established principle that an act of Court shall prejudice no man - *Actus curiae neminem gravabit*. The next question, however, is whether such a notice is necessary in terms of Rule 304 of the Rules. I shall elaborate on this aspect a little later.

16. It was next contended on behalf of the Respondent that unless the Plaintiff was to challenge the decree, it was not open for her to maintain any application. This submission was made on the basis of exposition in Para 6 of the Apex

Court in the case of **Vasudeo Dhanjibhai Modi (supra)**. In my opinion, it is complete misreading of the said decision. Para 6 of the said decision reads thus :

> "6. A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties".

17. The Apex Court has observed that the question whether the decree is erroneous, cannot be agitated by any party unless the decree was to be set-aside by an appropriate proceeding. However, in the present case, the question is not that the decree is erroneous as such, but whether the ex-parte Judge’s order passed in favour of the Respondent by this Court should be allowed to continue. Thus understood, it is not a case of accepting the challenge of the Plaintiff that the decree as passed is erroneous. As such, there is no substance in the objection taken by the

Respondent regarding the maintainability of the Chamber Summons on this count.

18. It was next argued that the Plaintiff had asked for similar relief in Notice of Motion filed in Suit No.3064 of 2004, for which reason, it is not open to the Plaintiff to seek same relief in the present Chamber Summons. There is no dispute that the Plaintiff had asked for similar relief in Notice of Motion No.3124 of 2004 which came to be disposed of by order dated 1st April 2005. In Para 2 of the said order, it is, however, clearly opined by the learned Judge dealing with the said Notice of Motion that as the Plaintiff has already sought similar relief in the present Chamber Summons, no orders were necessary insofar as prayer clause (a) of the Notice of Motion. In other words, the learned Judge has not considered the merits of the claim with reference to the relief in terms of prayer clause (a) of the Notice of Motion and has left the question open which will have to be answered in the present Chamber Summons. In any case, the issue as to whether the Judge's Order dated 30th April 2002, which was ex-parte order can

be allowed to continue, will have to be decided in the proceedings emanating from Suit No.447 of 1965 between the parties therein. Thus understood, there is no substance even in this objection to the maintainability of the Chamber Summons.

19. It is next contended on behalf of the Respondent that if subject Chamber Summons was to be allowed, that would result in circumventing the mandate of Order XXIII Rule 3A of the Code of Civil Procedure. Rule 3A of Order XXIII provides that no Suit shall lie to set aside a decree on the ground that the compromise on which the decree is based, was not lawful. Once again, this submission clearly overlooks that the Plaintiff was not questioning the Consent Decree as passed in any manner. The limited grievance of the Plaintiff in the present proceedings is, however, confined to the ex-parte Judge’s Order passed on 30th April 2002. The case of the Plaintiff is that it was imperative to give notice to the Plaintiff before passing of such order especially in the fact situation of the present case. If that stand was to be accepted, this Court will be called upon only

to relegate the parties to the situation, which obtained before 30th April 2002. No more and no less. Thus understood, it is not circumventing the decree as such, but correcting the manifest error committed by this Court in passing ex-parte Judge's Order dated 30th April 2002, which has resulted in miscarriage of justice.

20. The argument canvassed on behalf of Respondent that this Court has no jurisdiction to entertain Chamber Summons, having become *fuctus officio*, clearly overlooks the position that if that argument was to be accepted, for the same reason, the ex-parte Judge's Order passed on 30th April 2002 will have to be held as without jurisdiction. Be that as it may, the present Chamber Summons has been taken out to recall and set-aside the ex-parte Judge's Order passed on 30th April 2002. In other words, if the present Chamber Summons has been taken out to undo the ex-parte order passed by this Court on 30th April 2002, the same cannot be termed as not maintainable on the ground that this Court has become *functus officio*.

21. In the circumstances, the objection regarding maintainability of Chamber Summons raised on behalf of the Respondent will have to be negated on the above reasoning.

22. That takes me to the second point for consideration. The question is: whether the subject Chamber Summons for setting aside Judge's Order dated 30th April 2002 is time barred or otherwise? There is no express provision in the Code of Civil Procedure brought to my notice, which would obligate the Plaintiff to take out such application in specified time. If it is so, the issue will have to be decided only with reference to Article 137 of the Limitation Act. Article 137 of the Limitation Act as is rightly submitted on behalf of the Plaintiff relying on the decision of the Apex Court in **The Kerala State Electricity Board, Trivandrum (supra)**, the period of limitation is three years from when the right to apply accrued. The right to apply can be said to have accrued to the Plaintiff on the date when the Plaintiff acquired knowledge about the ex-parte Judge's Order passed in favour of the Respondent.

According to the Plaintiff, the Plaintiff became aware about the said order in November 2004, whereas, according to the Respondent, the Plaintiff aware about the order in July 2003 itself.

23. Taking any view of the matter, the present Chamber Summons which has been filed on 18th January 2005, cannot be said to be time barred. Even if we were to take the date of Judge's Order i.e. 30th April 2002 for the purpose of computing period of limitation, even then, the present Application having been filed within three years therefrom, is within time. Accordingly, objection regarding limitation raised on behalf of the Respondent will have to be rejected.

24. To get over this position, it was contended that the Plaintiff has not approached this Court with clean hands. In the affidavit in support of the Chamber Summons, it is asserted by the Constituted Attorney of the Plaintiff that the Plaintiff became aware of the Judge's Order dated 30th April 2002 for the first time in November 2004, whereas, in fact, the Plaintiff was aware

about the existence of that order in July 2003. Even if the stand of the Respondent that the Plaintiff became aware about the Judge's Order in July 2003 was to be accepted, for the reasons already mentioned above, it is not possible to take the view that the Application as filed is time barred. In other words, as no benefit is derived by the Plaintiff due to such assertion, the Plaintiff cannot be non-suited on this objection.

25. The next point which arises for my consideration is: whether the "ground" pressed into service for seeking Judge's Order dated 30th April 2002 to unseal the decree was available to the Respondent in terms of Rule 304 of the High Court (Original Side) Rules? Before I proceed to consider this aspect, it is apposite to reproduce Rule 304 which reads thus:

> **"R.304.Errors, how rectified after decree or order is sealed.-** After a decree or order has been sealed, any application to rectify an inaccuracy or clerical or arithmetical error shall be made to the Prothonotary and Senior Master and he may, in his discretion, after notice to the parties when he deems it necessary, rectify such inaccuracy or error. The

> Prothonotary and Senior Master may, if he thinks fit, place the matter before the Judge who passed the decree or order or in the event of his absence on leave or retirement before any other Judge and the Judge may, in his discretion, after notice to the parties when he deems it necessary, amend the decree or order so as to bring it in conformity with the judgment or rectify such inaccuracy or error."
>
> (emphasis supplied)

. On plain reading of the abovesaid rule, it is obvious that application could be filed to rectify the inaccuracy or clerical or arithmetical error. Even if the Plaintiff is justified in contending that the mistake pointed out in affidavit in support of Judge's Order cannot be said to be arithmetical error, even then, the error committed by the Prothonotary and Senior Master of sealing the decree without the same being sent to the Superintendent of Stamps for adjudication of stamp duty can be stated as clerical error and at any rate, an inaccuracy or error in the process. In my opinion, such error can be corrected by way of Judge's Order under Rule 304. A priori, the ground pressed into service by the Respondent to seek Judge's Order was available to the Respondent

in law.

26. The next question is: whether the ex-parte Judge's Order dated 30th April 2002 as passed can be allowed to be continued, as admittedly, no prior notice was given to any person including the Plaintiff? We have already adverted to Rule 304. The purport of Rule 304 as is rightly contended is an enabling provision. It is open to the Prothonotary and Senior Master to dispense with the notice to the parties in cases where the error to be corrected is a technical or a nominal one. In other words, the error to be corrected is such that it is indisputable. However, if the application is to rectify an inaccuracy or error of the nature as in the present case, in which, it is open to the opposite party to agitate that the decree has become inexecutable; in such a case, the notice before passing any order in application to rectify such inaccuracy or error would be necessary, rather imperative. That, however, would depend on the facts of each case. Rule 304 enables the Prothonotary and Senior Master to place the matter before the Judge who passed the decree or

the order or in the event of his absence on leave or retirement before any other Judge and the Judge may, in his discretion, after notice to the parties when he deems it necessary, amend the decree or order so as to bring it in conformity with the Judgment or rectify such inaccuracy or error. In the present case, the Prothonotary and Senior master has resorted to the latter part of Rule 304 by placing the matter before the concerned Judge. There is nothing on record to indicate that the Prothonotary and Senior Master or for that matter, the concerned Judge, had issued notice to the interested parties. It is rather admitted position that no notice was served upon the Plaintiff before the Judge's Order dated 30th April 2002 came to be passed. In the present case, having regard to the nature of objections taken on behalf of the Plaintiff, that go to the root of the matter, in my opinion, non issuance of notice to the Plaintiff before passing the Judge's Order dated 30th April 2002 has resulted in manifest miscarriage of justice. Inasmuch as, it is contended that it was apparent from the record that the decree had become inexecutable by operation of law. The decree was

passed as back as on 22nd February 1977, the sealing order came to be passed on 24th March 1987, whereas, the prayer for desealing of the decree was made only on 30th April 2002. In such a case, Article 137 of the Limitation Act will come into play. In the case of **The Kerala State Electricity Board, Trivandrum (supra)**, the Apex Court in para 22 has observed that Article 137 of the Limitation Act will apply to any Petition or Application filed under any Act to a Civil Court. The Application which was filed by the Respondent inviting the Judge's order dated 30th April 2002 was, therefore, required to be filed within three years from the date of sealing of the decree on 24th March 1987, for which reason, the same was time barred. Besides, it is contended that the Respondent is not the sole heir of deceased Defendant. To my mind, it would have been appropriate that notice was given not only to the Plaintiff, who is one of the heir of the deceased Defendant, but also to the other surviving heirs of the deceased Defendant.

27. It was next argued on behalf of the Plaintiff that the decree itself had become

inexecutable after 22nd February 1989 by passage of twelve years from the date of the decree dated 22nd February 1977. It was also argued that by virtue of Section 17 of the Registration Act read with the provisions of the Transfer of Property Act read with the provisions of the Bombay Stamp Act, 1958, the decree was required to be registered. If it is so, by virtue of Section 23 of the Registration Act, the decree was required to be registered within four months and at best, another extended four months from the date of decree by virtue of Section 25 of the same Act. In other words, it is submitted that the decree was required to be registered and as the same has not been registered, it has become inexecutable. The above objections are formidable objections and if accepted, would go to the root of the matter. In such a case, it would have been appropriate to issue notice to all concerned, so that, proper order could have been passed on the application preferred by the Respondent, as may be warranted in law. As ex-parte Judge’s Order came to be passed on 30th April 2002, all these aspects have not been considered and could not be determined before

passing the order which has resulted in serious miscarriage of justice.

28. Indeed, Counsel for the Respondent had argued that registration of the decree was unnecessary. However, that submission will have to be considered in the backdrop of the stand taken by the Plaintiff. Firstly, it is the Respondent's own case that the decree was required to be stamped and registered. Secondly, the argument of the Respondent proceeds on the basis of provisions, which obtained prior to 1985, whereas, the decree has been sealed on 24th March 1987 and will have to be stamped and registered after coming into force of the amended provision. Besides, the decree as passed is indicative of the fact that registration of such a decree was necessary as it would operate as transfer, reconveyance, conveyance and assurance of the immovable property. Relevant portion from the decree to support this submission pressed into service on behalf of the Plaintiff reads thus:

> "DOTH FURTHER ORDER that this Decree do operate as the Transfer, Reconveyance, Conveyance and Assurance of the said

> immoveable property described in the Schedule hereto by the Plaintiff in favour of the Defendant AND THIS COURT by and with such consent DOTH FURTHER ORDER that the Plaintiff do, at the costs of the Defendant, execute such further and other deeds, documents, assurances, writings, applications, etc. if and when required and whenever called upon by the Defendant to do so, with a view to carry out the provisions of this Consent Decree and to do such further acts, deeds and things as the Defendant shall require for more perfectly effectuating this decree and for ever absolutely and more perfectly and effectually vesting the said immoveable property described in the Schedule hereto in favour of the Defendant and for transferring in the name of the Defendant the said immoveable property described in the Schedule hereto in the Records and Registers of the Bombay Municipal Corporation and the Collector of Bombay, and i the Records and Registers of the Government and other Departments and for the purposes of better implementation, effectuating and carrying out this Consent Decree and the Defendant doth bear and pay all costs of such deeds, documents, writings, assurances, applications."

29. It is not necessary for me to examine all the above said points and other contentions pressed into service on behalf of the Plaintiff; for, the correctness of those submissions will have to be tested in the application taken out by the Respondent seeking order in terms of Judge’s Order passed on 30th April 2002.

30. In the present Chamber Summons, the limited question is, whether the ex-parte order dated 30th April 2002 should be set-aside. Indeed, once that order is set-aside, the parties will stand relegated to their original position as obtained prior to 30th April 2002 and that all steps taken on the basis of the said order will have to be treated as non-est in Law. The Application which was filed by the Respondent inviting Judge's Order will therefore stand restored to the file to its original number, to be decided on its own merits in accordance with law, after hearing all concerned. Thus, understood, it is not necessary for me to go into the issues canvassed on behalf of the Plaintiff referred to above. Suffice it to observe that the Plaintiff has raised arguable questions which go to the root of the matter, which will have to be tested and appropriate decision taken on the application preferred by the Respondent, which is restored to the file by this order.

31. The last aspect that needs to be

considered is: whether the Plaintiff is disentitled for any equitable relief from this Court? In my opinion, it is unnecessary for me to go into the conduct of the parties for each of them have enough material against the other. Rather, the attempt seems to be to march over the other. Be that as it may, the objection of the Respondent is that the Plaintiff has caused to file affidavit of the constituted attorney. The fact that the constituted attorney was duly authorised by the Plaintiff, cannot be disputed. Besides, it is rightly contended on behalf of the Plaintiff that the stand taken by the constituted attorney in the affidavit in support of the Chamber Summons has been not only ratified, but also reiterated and adopted by the Plaintiff in the rejoinder affidavit filed in the present Chamber Summons, which has remained uncontroverted. Viewed in this perspective, the Plaintiff cannot be non-suited on the technical argument canvassed on behalf of the Respondent. Reliance placed on the decision of the Apex Court in the case of **Janki Vashde Bhojwani & Anr. (supra)** is inapposite, for, in the present case, the Plaintiff herself has filed affidavit

before this Court in the form of rejoinder affidavit, and which has remained uncontroverted. Suffice it to observe that it does not lie in the mouth of the Respondent to object to the present Application on the argument of conduct of the Plaintiff, especially when this Court has already recorded finding of fact against the Respondent of having played fraud on the Court in derivative proceedings.

32. Accordingly, this Chamber Summons ought to succeed.

33. It is, however, made clear that this decision is not an expression of opinion on any of the issues or contentions which are available to the respective parties in the application filed by the Respondent inviting order in terms of Judge's Order dated 30th April 2002, which questions will have to be considered on its own merits in accordance with law.

34. For the aforesaid reason, Chamber Summons succeeds in terms of prayer clause (a) with costs.

35. As a consequence of this order, the Application of the Respondent No.1 inviting order in terms of Judge’s Order dated 30th April 2002 will stand restored to the file to its original number, to be decided afresh on its own merits in accordance with law. Ordered accordingly.

36. At this stage, Counsel for the Respondent No.1 prays that the operation of this order be stayed to enable the Respondent No.1 to take up the matter in appeal, if so advised. As the request is reasonable, this order not to be given effect to for a period of eight weeks from today.

A.M.KHANWILKAR, J.